In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 230.

ELIZABETH M. HUMPHRIES, by next friend, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, granting a motion to vacate the judgment of the Supreme Court of the District of Columbia, and granting a new trial, entered in this case January 4, 1897.

The case was tried to a jury on November 20, 1896, and as the trial closed about the hour of adjournment of the court, the jury were told that they might return a sealed verdict, and the following printed paper was given to the jury (Rec. 5):

"When the jury agree upon a verdict, write it out, all the jury sign it, date it, seal it up, and deliver it to the foreman, to be delivered in open court on the first day of December, 1896, *and in the presence of all who signed it.*"

On December 1, 1896, all the jurors appeared in court except *John T. Wright*, who did not appear, but he

having the sealed verdict in his possession, sent it to the court by *Dr. Williams*, who delivered the same, with a statement that the said Wright was ill and confined to his bed and physically unable to appear in court; that he was Wright's attending physician, and as such received the sealed verdict from him with directions to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict. (Rec. 4.) The eleven jurors having in response to questions by the court, stated that they had severally signed said verdict, and had seen Wright sign it. Counsel for the defendant asked that the jury be polled, which being done, only *eleven* responded. The Court then received the verdict, and ordered it to be recorded. The defendant moved in arrest and the court overruled its motion, and entered judgment on said verdict, and the defendant removed the case by writ of error to the Court of Appeals. Subsequently the plaintiff moved the trial court to correct the entry of the verdict by setting out at length the written verdict, which the court allowed. (Rec. 7.) Upon the verdict as corrected under the order of the court no new judgment was entered; but the judgment as originally entered, upon the first entry of the verdict as of the *eleven* jurors, was allowed to stand. The only change in the original entry of what purported to be the verdict was in placing upon record the paper signed by the twelve jurors, in place of the entry of the oral verdict of the eleven jurors as delivered in court, in which oral verdict it was declared "that the *remaining jurors* on their oaths say, they find said issue in favor of the plaintiff," etc. (Rec. 4.) The appeal of the District of Columbia was dismissed for failure to comply with the rule in regard to filing transcripts (11 App. D. C. 68):

Thereupon the defendant filed its motion in the trial court, to vacate the judgment because there was no verdict, and that the judgment was not entered in accordance with the practice of the court. (Rec. 9.) This motion was overruled by the court; the defendant again appealed to the Court of Appeals, which court vacated the judgment, set aside the verdict, and awarded a new trial (12 App. D. C. 122); and from this order the plaintiff appealed to this court.

POINTS AND AUTHORITIES.

IT WAS THE RIGHT OF THE DEFENDANT TO POLL THE JURY.

It is the established practice in the courts of this District, as it is in the courts of the State of Maryland, and the courts of many other States of the Union, and also of England, says Mr. Chief Justice Alvey, in 11 Apps. D. C. 73, "that either party has the right to have the jury polled, on the rendition of the verdict by the foreman, at any time before it is finally recorded; and this, although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been *expressly waived*. *Bunn v. Hoyt*, 3 Johns. 255; *Root v. Sherwood*, 6 Johns. 68; *Fox v. Smith*, 3 Cow. 23; *Jackson v. Hawks*, 2 Wend. 619; *Labar v. Koplin*, 4 N. Y. 547; *Blackley v. Sheldon*, 7 Johns. 33; *Rigg v. Cook*, 9 Ill. 351; Thompson & Merriam on Juries, Secs. 337, 338. This subject is very fully and ably examined by Judge Folger in the case of *Warner v. The N. Y. Central R. Co.* 52 N. Y. 437, where it was held that the verdict can only be received from the jury in court, in the presence of the parties, if they think proper to be present, and that it is the right of either party to have the jury polled, unless that right be expressly waived, and that such right

is not waived by simply agreeing that the jury may return a sealed verdict.

The right to poll the jury is regarded as an absolute right in either party, and the refusal of the trial court, upon request to have the jury polled, is such an error as will require the appellate court to reverse the ruling. *James v. State*, 55 Miss. 57. In this last case mentioned it was said by the Court: "Parties should have the means to protect themselves against the consequences of undue influence of any sort, which, employed in the privacy of a jury room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury."

"In the case of *State v. Young*, 77 N. C. 498, where the question was raised as to the right of a party to have the jury polled, the court said: "The right of the judge to poll the jury is immemorial, and has never been questioned, so far as we are informed. We can see no good reason why it should be denied to the defendant, and we cannot conceive a case in which any harm would result from the exercise of it under the direction of the court, and experience shows that notwithstanding the response of the foreman for the jury, there are cases in which individual jurors refuse to assent on being polled. How is the defendant to know that this is really the verdict of all, and that no one has been deceived or coerced into an assent to that which his judgment does not now concur in? There is no mode of ascertaining this fact except by the evidence

of the jurors themselves when they come into court. * * * At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is the only mode of ascertaining the fact that it is the verdict of the whole jury."

THERE WAS NO VERDICT IN THE CASE ON WHICH TO ENTER JUDGMENT.

The judgment was founded alone on the sealed verdict; on this sealed verdict the Court considered that the plaintiff recover $7,000.00 "in manner and form aforesaid assessed;" that is, by the "eleven" jurors and not otherwise.

But a sealed verdict, *i. e.*, the paper writing, is not evidence nor is it to be filed or preserved.

28 Ency. of Law 411, note 1, citing.
Dormant v. Ruhenback, 10 S. & R. 84.

The entry should have been, "the jurors on their oath say, etc., and assess her damages," etc.

The verdict must be public.

28 Ency. of Law 416 and note.

The jury must be present to render a sealed verdict.

28 Ency. of Law 409-410 and note.
Thompson & Merrian, Juries, par. 333, 334, 338;
Rigg v. Cook, 9 Ill. at 351;
Fox v. Smith, 3 Cow. 23;
Jackson v. Hawks, 2 Wend. 620;
Root v. Sherwood, 6 Johns, 68;
Lawrence v. Stears, 11 Pick, 501;
Edelin v. Thompson, 2 H. & J. 32.

Polling the jury is a right of the parties.

Thompson & M. on Juries, par. 338;
28 Ency. of Law 1. 349;
2 Poe's Practice, par. 329, 331;
12 Md. 514; 60 Md. 402.

The right is not waived by a sealed verdict.

28 Ency. Law, 415.
Root v. Sherwood, *supra.*
Stewart v. Pugh, 23 Mich., at 77
U. S. V. Patter, 6 McLean, 168

If it can be said that the defendant consented to anything in respect of the sealed verdict, that consent surely cannot exceed the printed, unambiguous, instructions on the paper given to the jury by the Court. Those instructions required *all* the jurors to be present the next day in court; this preserved, by necessary implication, the defendant's right to poll the jury. How can it be considered to have waived any such valuable right? The trial judge did not so consider, nor did the counsel for the appellee, for the court without objection from counsel allowed the defendant to poll the jury, as was its right; or if he considered it was discretionary, he then exercised that discretion.

There is no escape from the fact that there is no entry of any verdict on which any judgment could be founded; or if there is any verdict entered it is of *eleven* jurors only. In contemplation of law, there is no verdict; and there is no judgment.

THE JUDGMENT COMPLAINED OF WAS IRREGULAR AND VOID.

Relief against an irregular or voidable judgment under ancient practice was by writ of *coram nobis.* In modern practice a motion is substituted for this writ.

12 Am. and Eng. Enc., 132; Phillips v. Negley, 117 U. S., 665.
Pickett's Heirs v. Legerwood, 7 Pet., 144; Poe's Practice, 395.

The Court of Appeals, in its opinion dismissing the first appeal of the District in this case pronounced the verdict on which the judgment was based; "a mere nullity and of no effect whatever * * *; a void verdict."

11 Apps. D. C. 77.

THE TRIAL COURT EXCEEDED ITS JURISDICTION IN ENTERING OUT JUDGMENT, AND THE JUDGMENT IS VOID.

In the case of U. S. v. Walker (109 U. S., 258), which was an action on an administrator's bond, it was held that an order passed by the Supreme Court of the District of Columbia directing an administratrix to pay over the fund to her successor was void, because that court exceeded its jurisdiction.

"Although the court" (says Mr. Justice Woods) "may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is *void*."

This court has also said:

"Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the act of Congress the District Court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest."

Bigelow v. Forrest, 9 Wall., 339.

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these

two facts make valid, however erroneous it may be, any judgment the court may render in such case."

Ex parte Lange, 18 Wall., 163-176.

A judgment may be impeached, even collaterally, if "the court had no jurisdiction of the case, *or the judgment rendered was beyond its power.*"

Cooper v. Reynolds, 10 Wall., 316.

This court has held that where a court is without authority to pass a particular sentence, such sentence is void.

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or by any other reason, the judgment is void, and may be questioned collaterally * * * (183). It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's Constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant (184). In *ex parte* Lange and *ex parte* Snow there was denial or invasion of a Constitutional right."

Ex parte Neilsem, 131 U. S., 176.

THE CONSTITUTIONAL RIGHT OF TRIAL BY JURY WAS DENIED THE DEFENDANT IN THIS CASE.

The Seventh Amendment to the Constitution provides that "in suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved."

In the Territories and the District of Columbia this

involves unanimity in the verdict rendered by the whole number of jurors. By any other verdict a Constitutional right is denied.

Am. Pub. Co. v. Fisher, 166 U. S., 464.
Springfield v. Thomas, *idem*, 707.

THE JUDGMENT OF THE TRIAL COURT WAS NOT ACCORDING TO THE PRACTICE OF THE COURT, AND MIGHT BE SET ASIDE AT ANY TIME.

A judgment may be set aside by a court after the term, where it was not entered in accordance with the practice of the court:

Bailey v. Sloan, 65 Cal., 387.
Ames v. Brinsden, 25 Kan., 520.
Fenton v. Garlick, 6 Johns N. Y., 288.
Dick v. McLaurin, 63 N. C., 185.
Merrick v. Baltimore, 43 Md., 299.
Folger v. Columbiana Ins., 99 Mass., 267.
Fithian v. Monks, 43 Mo., 502
Seamster v. Blockstock, 83 Va., 232.
Anthony v. Kasey, 83 Va., 338.

"A departure from an established mode of procedure will often render the judgment void; thus, a sentence of a person charged with felony upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the chancellor, and the reason is that the courts are not authorized to exercise their power in that way."

Windsor v. McVeigh, 93 U. S., 283.

"Whatever difficulty may be experienced in giving to those terms (due process of law) a definition which will embrace every permissible exercise of power affecting private rights and exclude such as is forbidden, there

can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence, for the protection and enforcement of private rights."

Pennoyer v. Neff, 95 U. S., 733.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it acts without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

Elliott v. Peirsol, 1 Pet., 340.
Wilcox v. Jackson, 13 Pet., 511.
Hickey v. Stewart, 3 How., 762.
Thompson v. Whitman, 18 Wall., 467.
In re Sawyer, 124 U. S., 220.

The difference between void and voidable judgments is that the former can always be assailed in any proceeding, and the latter in a direct proceeding only.

28 Am. & Eng. Ency. of Law, 473, 475.
Alexander v. Nelson, 42 Ala., 462.

An irregular judgment may be set aside at a subsequent term.

Union Bank v. Crittenden, 2 Cranch C. C., 283.
Ault v. Elliott, *idem*, 372.
Jones v. Kemper, *idem*, 535.
Hyer v. Hyatt, *idem*, 633.
Newton v. Weaver, *idem*, 685.

THE REASONS ASSIGNED BY THE TRIAL COURT IN ITS OPINION ARE INAPPLICABLE.

The learned justice of that court, in overruling the motion to vacate the judgment (Rec. 11), based his action upon the idea that although the defendant was denied its constitutional right of trial by jury, nevertheless the court in entering the judgment merely committed *an error of law*, reversible only by appeal.

The principal case relied on by counsel for the appellant is *in re* Eckert, 166 U. S., 481, which is entirely dissimilar to the case at bar. In that case the verdict did not acquit Eckert of the crime of which he was charged, but found that he had committed an offence embraced within the accusation upon which he was tried, and the verdict had been held good by the Supreme Court of Wisconsin; so that this court in that case was dealing not with a verdict that had been adjudicated to be a mere nullity, but with a verdict which had been adjudged by the highest court of the State to be a good verdict.

So also in respect of the case *in re* Belt, 159 U. S., 95. Belt had been convicted in 1893 in the Police Court of the District of Columbia of the crime of larceny. In that court the record showed that he waived trial by jury and was tried by the court without a jury. In 1894 he was indicted in the Supreme Court of the District of Columbia for a second offence of larceny, and it was sought to be shown at the trial that this was the second offence by producing the record of the Police Court in the first case against him, to which objection was made on the ground that the record of the Police Court showed that he had waived trial by jury, and that the conviction in the Police Court was, therefore, unconstitutional and void. But the court in refusing his

application for *habeas corpus* dealt not with a *void verdict or void judgment*, but with a judgment of the Police Court, admitted in evidence by the Criminal Court, whose action had been affirmed by the Supreme Court of the District of Columbia.

For these reasons it is submitted that the judgment of the court below should be affirmed.

S. T. THOMAS,
A. B. DUVALL,
For District of Columbia, Appellant.